

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No.335/1989

Office Notes, Memoranda of Coram,

appearances, Court's orders or directions : Court's or Judge's orders
and Registrar's orders.

Coram : A.P. Lavande, J.

Dated : 15th September 2006

The appellants preferred the above second appeal against judgment and decree dated 7th August 1989 passed by District Judge, Akola in Regular Civil appeal No. 306/1986 dismissing the appeal filed by the appellants against judgment and decree dated 18th August 1986 passed in Regular Civil Suit No. 59/1983 filed by Wahab Been Abdullah against appellants. The respondents are the legal representatives of Wahab Been Abdullah.

Wahab Been Abdullah, claiming to be the owner of the field Survey No.11/1, admeasuring 5 Hectares 18 R situated at village Lasnapur, Tahsil Murtizapur, District Akola (hereinafter referred to as "the suit

property”) filed the above suit against defendants for recovery of possession of the suit property. The suit was contested and after appreciating the evidence led by the parties, the trial Court decreed the suit. The appeal preferred against the said judgment and decree was dismissed by the lower appellate Court. The present appeal has been preferred challenging both the judgments and decrees.

During the pendency of the appeal original plaintiff Wahab Been Abdullah expired and by order dated 14th November, 2005 this Court permitted seven legal representatives to be brought on record in place of deceased respondent. It appears that since at the relevant time respondent nos. 4, 5 and 7 were residing at abroad, they could not be served. Thereafter, the appellants filed Civil Application No. 4801/2006 seeking leave to delete the names of respondent nos.4, 5 and 7 from the array of respondents. This Court, by order dated 7.8.2006, permitted the

appellants to delete the names of respondent nos. 4, 5 and 7 from the array of respondents at their own risk. Accordingly, the names of respondent nos. 4, 5 and 7 were deleted. The appeal was admitted on several substantial questions of law.

When the matter was called out for hearing Mr. Haq, learned counsel for respondent nos.1, 2, 3 and 6 submitted that in view of the fact that respondent nos. 4, 5 and 7 have been deleted by the appellants at their own risk, the entire appeal abates as a whole inasmuch as the decrees passed by both the Courts below have become final insofar as respondent nos. 4, 5 and 7 are concerned. He further submitted that since the decrees passed by both the Courts below for possession in favour of the respondents have become final insofar as respondent nos. 4, 5 and 7 are concerned, the impugned decrees cannot be set aside in the absence of respondent nos. 4, 5 and 7 inasmuch as in the event the appeal is allowed, there would

be two contradictory decrees i.e. one is in favour of respondent nos. 4, 5 and 7 and other against respondent nos. 1,2, 3 and 6, which is impermissible in law. He, therefore, urged that the entire appeal has abated and as such deserves to be dismissed.

Per contra, Mr. Madkholkar, learned counsel appearing for the appellants submitted that the appellants filed Civil Application No.4801/2006 for deleting of respondent nos. 4, 5 and 7 in view of affidavit filed by respondent no.3 before the Executive Magistrate, Murtizapur in which it was stated that respondent nos. 4, 5 and 7 had given up Indian Nationality and, therefore, their names should be deleted from the list of heirs of deceased Wahab Been Abdullah. He submitted that according to respondent no.3, respondent nos. 4, 5 and 7 had also given up their Indian Nationality and their rights to inherit the properties of deceased Wahab Been Abdullah, they ceased to be heirs of

deceased Wahab Been Abdullah and, therefore, they are not necessary parties in the appeal inasmuch as they do not have any right in the suit property.

I have considered the submissions made by the learned counsel for the parties. I have also perused the records. This Court, by order dated 7.8.2006, permitted the appellants to delete respondent nos. 4, 5 and 7 at their own risk. It is pertinent to note that there is no material produced on record to substantiate that respondent nos. 4, 5 and 7 had relinquished their right in the properties including the suit property left by late Wahab Been Abdullah. The affidavit filed by respondent no.3 only states that since respondent nos. 4, 5 and 7 had given up Indian Nationality, they ceased to be heirs of Wahab Been Abdullah. Obviously, the said affidavit does not advance the case of the appellants that respondent nos. 4, 5 and 7 no more continue to be the heirs of late Wahab Been Abdullah. Respondent no.3 by

filing affidavit could not have divested respondent nos. 4, 5 and 7 of their right to inherit the properties including suit property of late Wahab Been Abdullah. It is also pertinent to note that the decree passed in favour of late Wahab Been Abdullah was a decree for possession and after his death his legal heirs are entitled to execute the decrees passed by both the Courts below.

In view of the above position, it is clear that the decree for possession passed by the trial Court which has been confirmed by the appellate Court has become final insofar as respondent nos. 4,5 and 7 are concerned and, therefore, in the event the appeal filed by the appellants is allowed there would be contradictory decrees which is not permissible in law.

In AIR 1972 Supreme Court 1455 (Madhi Vs. Mahanbai and others), the Apex Court held that the appeal had abated and consequently dismissed the appeal in view of the fact that one of the respondents-plaintiffs had died during pendency of the

appeal and his legal representatives had not brought on record.

In AIR 1973 Supreme Court 204 (Babu Sukhram Singh Vs. Ram Dular Singh and others) the Apex Court held that when a joint claim against several defendants is made in a suit and during pendency of appeal by the plaintiff some of the defendants die, the failure of the plaintiff to bring on record their legal representatives results in abatement of the appeal in toto.

In the present case, although the appellants brought the legal representatives on record even before respondent nos. 4, 5 and 7 were served they were deleted. As stated above, the decree passed in favour of deceased plaintiff which can be executed by his legal representatives including respondent nos. 4, 5 and 7 has become final insofar as respondent nos. 4, 5 and 7 are concerned. Therefore, the appeal abates. Consequently, the appeal stands dismissed.

At this stage, Mr. Madkholkar, learned counsel appearing on behalf of the

appellants submitted that the interim order passed by this Court granting status quo as to the possession may be continued for a period of 10 weeks in order to enable the appellants to approach the Apex Court. In the interest of justice the order of status quo as to the possession passed by this Court is continued for a period of six weeks.

JUDGE

A.